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Supreme Court, U.S.
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No.: _____

IN THE

Supreme Court of the United States

October Term, 1986

MATTHEW IANNIELLO, BENJAMIN COHEN, ALFRED IANNIELLO, MORTON WALKER, BERNARD KURTZ, CARL MOSKOWITZ and SOL GOLDMAN,

Petitioners,

-against-

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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Questions Presented

1. Whether the Second Circuit's decision in this case, which allows a "pattern of racketeering activity" to be established merely by proof of any two acts of racketeering committed within ten years, is correct under *Sedima, S.P.R.L. v. Imrex Co.*, 105 S. Ct. 3275 (1985)?

2. Whether this Court should grant certiorari to resolve the conflict between the Second Circuit's definition of "pattern of racketeering" and the definitions adopted in post-*Sedima* decisions of other courts of appeals?

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioners Matthew Ianniello, Benjamin Cohen, Alfred Ianniello, Morton Walker, Bernard Kurtz, Carl Moskowitz, and Sol Goldman respectfully pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit entered on December 4, 1986.

Opinions Below

The opinion of the Court of Appeals, reported as *United States v. Ianniello*, 808 F.2d 184 (2d Cir. 1986), is reprinted in the Appendix beginning at page 1a. The order of the Court of Appeals denying the petitioners' petition for rehearing appears in the Appendix at page 24a.

Jurisdiction

The judgment of the Court of Appeals for the Second Circuit was entered on December 4, 1986. A timely petition for rehearing was denied on January 28, 1987, and this petition for a writ of certiorari was filed within sixty days of that date. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

Statutory Provisions

Title 18, United States Code:

§ 1961. Definitions

As used in this chapter –

. . . .

(5) "pattern of racketeering activity" requires at least two acts of racketeering activity, one of which occurred after the effective date of this chapter and the last of which occurred within ten years (excluding any period of imprisonment) after the commission of a prior act of racketeering activity. . . .

* * *

§ 1962. Prohibited activities

(c) It shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity or collection of unlawful debt.

(d) It shall be unlawful for any person to conspire to violate any of the provisions of subsections (a), (b), or (c) of this section.

Statement of the Case

On December 30, 1985, after a jury trial before Judge Weinfeld in the Southern District of New York, the petitioners were convicted of one substantive violation of the Racketeer Influenced and Corrupt Organizations Act ("RICO"), 18 U.S.C. § 1962(c), and one RICO conspiracy count, in violation of 18 U.S.C. § 1962(d).[1] Both RICO counts were based primarily on predicate acts of mail fraud. In addition, all petitioners were convicted of some other lesser charges of mail fraud, tax evasion, and bankruptcy fraud, though the number of other counts varied widely among the petitioners. The details concerning these lesser convictions are not relevant to this Court's consideration of the questions presented in this petition.[2]

The proof at trial centered on six bars and restaurants in New York City. The basis for the RICO charges was the government's claim that all the petitioners had participated in an enterprise whose purpose was to "skim" money from these bars and restaurants, and to conceal this activity from interested state and federal authorities. The government's essential theory was that petitioners Matthew Ianniello and Benjamin Cohen held secret ownership interests in each of the six bars and restaurants. According to the prosecutors, Ianniello and Cohen, with the aid of their codefendants (including the other petitioners), misled the New York State Liquor

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[1] Codefendant Chester Cohen was tried and convicted along with the petitioners of two RICO counts, and two counts of mail fraud, 18 U.S.C. § 1341. A separate petition for a writ of certiorari will be filed on his behalf with this Court. Pursuant to Supreme Court Rule 19.4, all the petitioners join in the arguments raised in Chester Cohen's petition to the extent they are applicable to them and not inconsistent with the positions urged in this petition.

[2] As we discuss below, the district court suspended execution of all sentences imposed on the non-RICO counts. *See infra* p. 4.

Authority by causing liquor license renewal applications to be filed that falsely concealed their hidden interests. Then, so the theory ran, they would "skim" from the gross receipts of at least four of the entities, with the result that the "skimmed" receipts were concealed from the New York State taxing authorities. This alleged concealment formed the basis of mail fraud charges alleging fraud on the New York State Department of Taxation. Likewise, the government alleged that "skimmed" money from another entity allegedly was concealed from the Internal Revenue Service. These actions formed that basis of, respectively, charges of bankruptcy fraud and federal tax evasion.

Having cast Ianniello and Cohen as the principals in the alleged scheme, the government assigned lesser roles to the other defendants, including the other parties to this petition. The other defendants were alleged either to have acted as "fronts" for Ianniello and Cohen at one or more of the six establishments, or to have participated in the filing of documents or the preparation of financial records that attempted to conceal the purported interests of Ianniello and Cohen in these entities.

As noted above, the jury ultimately returned guilty verdicts on the RICO charges against all of the petitioners. The district court sentenced all petitioners to concurrent prison terms on the two RICO counts. Sentences were imposed as follows: Matthew Ianniello - 6 years; Benjamin Cohen - 5 years; Bernard Kurtz - 3 years; Morton Walker - 2 years; Sol Goldman - 1 year and one day; Carl Moskowitz - 2 years; Alfred Ianniello - 1 year and one day. Each petitioner also received consecutive fines on both RICO counts. On the lesser counts, the court suspended the execution of prison sentences and placed each petitioner on two years probation, to begin on their release from prison. Thus, each petitioner is now incarcerated only pursuant to the RICO convictions. This fact is particularly significant for purposes of this petition, because the claim of error for which review is sought by this Court relates primarily to the convictions on the RICO charges.

On appeal to the Second Circuit, petitioners argued, *inter alia*, that the district court's charge was fatally flawed with respect to the definition and construction of the "pattern of racketeering" element of the RICO statute. *See* 18 U.S.C. § 1961(5). Specifically, the district court's charge on this point was based on the Second Circuit's prior decision in *United States v. Weisman*, 624 F.2d 1118 (2d Cir.), *cert. denied*, 449 U.S. 871 (1980). In *Weisman*, the Second Circuit held that the "pattern" element of the RICO statute is satisfied when at least two predicate acts of racketeering are committed within a ten-year period in the conduct of the affairs of an enterprise. Relying on this Court's decisions in *Sedima, S.P.R.L. v. Imrex Co.*, 105 S. Ct. 3275 (1985), and *United States v. Turkette*, 452 U.S. 576 (1981), petitioners argued that *Weisman* was no longer good law. In particular, petitioners' argument focused on this Court's statement in *Sedima* criticizing lower courts for failure to develop a meaningful concept of "pattern," 105 S. Ct. at 3287, as well as on this Court's statements that while two racketeering acts are necessary to constitute a pattern, they may not be sufficient, *id.* at 3285 n.14. Further, petitioners argued that in light of *Sedima*, not only the number of predicate acts, but also their relatedness and the continuity of the criminal activity alleged, must be considered in determining the existence of a RICO pattern. *See id.* Because the district court's charge had merely followed *Weisman* and had not embodied any of these principles from *Sedima*, petitioners contended that reversal of the RICO convictions was required.

The Second Circuit rejected this contention, as well as the other arguments urged on appeal, and affirmed petitioners' convictions. At the outset, the court reaffirmed its prior holding in *Weisman*, and stated that it was bound by that holding unless overruled by this Court or by an *in banc* panel of the Second Circuit. (12a)[3]

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[3] Citations to "(a)" refer to the Appendix to this petition. Citations to "T ____ " refer to the transcript of proceedings in the district court.

The court went on to state, however, that in its view *Weisman* was not necessarily inconsistent with *Sedima*. It reasoned that under *Weisman*, the concepts of continuity and relatedness discussed in *Sedima* are supplied by the element of an "enterprise" under § 1962(c), to which the predicate acts of racketeering must be tied. In the court's view, the difference between *Weisman* and *Sedima* was "one of form and not of substance." (13a) The court asserted that the district court's charge had been fully consistent with both *Weisman* and *Sedima*, and suggested that any failure to charge in exactly the language contemplated by *Sedima* was at most harmless error.

Finally, the court explicitly acknowledged that its post-*Sedima* interpretation of the "pattern" requirement directly conflicted with the Eighth Circuit's decision in *Superior Oil Co. v. Fulmer*, 785 F.2d 252 (8th Cir. 1986). (15a)

REASONS FOR GRANTING THE WRIT

There are several reasons why a writ of certiorari should be granted in this case. First, the district and circuit courts are in substantial disarray on the issue presented in this case: the proper definition of the "pattern of racketeering" element of the RICO statute. We discuss below in general terms the conflict in the lower courts on the pattern issue, and in particular the extent to which the Second Circuit's decision in this case is at odds with the vast majority of other post-*Sedima* pattern decisions. The specific contours and nuances of this conflict are discussed in detail in the petition to be filed by codefendant Chester Cohen, in which petitioners join. The essence of our position is that the conflict on the pattern issue can be resolved only by a definitive holding of this Court, and that this case presents the proper vehicle for such a holding because the position adopted by the Second Circuit in this case is virtually unique, is in direct conflict with the other circuits, and, we submit, is erroneous. Second, we believe that review is

warranted because the district court's charge incorrectly applied controlling Supreme Court precedent, including the *Sedima* and *Turkette* decisions. The Second Circuit rejected this claim, finding that the charge met the dictates of *Sedima* and thus that any error was harmless. However, as we discuss below, the Second Circuit was quite simply wrong in its assessment of the charge, and its error should be corrected by this Court. Third, the writ of certiorari should be granted because the RICO "pattern" issue is a very important one in current civil and criminal litigation.

Most of the conflict in the lower courts regarding the "pattern" issue has arisen in the wake of the *Sedima* decision. In that case, this Court noted "the failure of . . . the courts to develop a meaningful concept of 'pattern [of racketeering activity].' " 105 S. Ct. at 3287. The Court implied that such a meaningful definition should be based on more than simply the number of predicate racketeering acts, stating that "while two acts are necessary, they may not be sufficient." *Id.* at 3285 n.14. Indeed, the *Sedima* Court stated that the legislative history of RICO supports the view that two acts of racketeering, without more, do not constitute a pattern. Instead, the Court stressed that it was not only the number of acts, but also their relationship, and the continuity of the racketeering activity alleged, that must be considered in determining the existence of a RICO pattern. *Id.* The Court directed the lower courts' attention to another statutory section, 18 U.S.C. § 3575(e), enacted as part of the same bill, which provides that criminal conduct forms a pattern if it "embraces criminal acts that have the same or similar purposes, results, participants, victims, or methods of commission." This Court stated that the language of § 3575(e) may be "useful in interpreting other sections of the Act." 105 S. Ct. at 3285 n.14.

Unlike the Second Circuit, most other courts have modified or reconsidered their definitions of a RICO "pattern" based on these statements in *Sedima*. While some courts have, like the Second Circuit, characterized

the statements as dicta, most have not been as willing as the Second Circuit was in this case to disregard *Sedima* completely. One court, in discussing footnote 14 of *Sedima*, stated that it was dicta, but went on to note that "it is *dicta* that has been mentioned in virtually every case considering the pattern of racketeering element under RICO since . . . *Sedima*. The pattern of racketeering issue has become a mountain overshadowing much of the RICO landscape." *Schaafsma v. Marriner*, 641 F. Supp. 576, 578 (D. Vt. 1986). Another court has stated that the *Sedima* pronouncement "creates a whole new ballgame" and sends an "unmistakable signal" to lower courts as to the proper interpretation of the "pattern" element. *Northern Trust Bank v. Inryco*, 615 F. Supp. 828, 833 (N.D. Ill. 1985).

The "pattern" definition adopted by the Second Circuit is clearly contrary to the dictates of *Sedima*. The *Ianniello* decision reaffirms the Second Circuit's pre-*Sedima* decision in *Weisman*, which held that a RICO "pattern" could be proved merely by showing the commission of two racketeering acts within ten years. *Weisman*, 624 F.2d at 1122. This Court expressly disapproved of this type of mechanical, numerical approach to the "pattern" issue in footnote 14 of *Sedima*. The *Ianniello-Weisman* rule, we submit, is precisely what this Court had in mind in *Sedima* when it criticized the lower courts for their failure to fashion or develop a meaningful concept of a RICO pattern. The Second Circuit's rule allows a pattern to be established by proof of predicate acts that lack any "continuity" or "relationship," the essential characteristics of a pattern stressed in the legislative history and quoted with approval in *Sedima*. Further, the *Ianniello-Weisman* "pattern" rule requires far less proof than is needed to establish a "pattern" under 18 U.S.C. § 3575(e). Indeed, in *Weisman* the Second Circuit considered and explicitly rejected the argument that § 3575(e) should govern the "pattern" element under the RICO statute. Although the validity of this portion of *Weisman* would at least seem to have been placed in question by *Sedima*, the Second Circuit in

this case reaffirmed *Weisman* without even noting, much less addressing, this obvious inconsistency.

As the court of appeals acknowledged in its opinion, the Eighth Circuit has adopted a conflicting definition of pattern. Under the Eighth Circuit's approach, two predicate acts, standing alone, do not establish a pattern of racketeering activity. *See Superior Oil Co. v. Fulmer*, 785 F.2d 252 (8th Cir. 1986); *see also Holmberg v. Morrisette*, 800 F.2d 205 (8th Cir. 1986). In *Superior Oil*, the defendants had converted the plaintiff company's oil to their own use, and had filed false reports in an attempt to conceal their activity. The court held that these multiple acts of fraud did not constitute a "pattern." 785 F.2d at 257. The court characterized defendants' conduct as a single continuing criminal scheme to convert gas, and found that the "continuity" of criminal activity necessary to establish a pattern was lacking. *Id.* Under the *Ianniello-Weisman* rule, however, the same facts would have clearly established a "pattern," merely by virtue of the number of predicate acts.

The decision in this case also places the Second Circuit in conflict with the Tenth, Seventh, and Ninth Circuits. *See Torwest DBC Inc. v. Dick*, Dkt. No. 86-1450, slip op. (10th Cir. Jan. 20, 1987); *Morgan v. Bank of Waukegan*, 804 F.2d 970 (7th Cir. 1986); *Lipin Enterprises v. Lee*, 803 F.2d 322 (7th Cir. 1986); *Elliot v. Chicago Motor Club Insurance*, 809 F.2d 347 (7th Cir. 1986); *Schreiber Distributing Co. v. Serv-Well Furniture Co.*, 806 F.2d 1393 (9th Cir. 1986). While not all of these courts have treated the "pattern" question in exactly the same fashion as the Eighth Circuit, all are in agreement that something other than the simple number of predicate acts must be examined in determining whether a RICO "pattern" has been proved. For instance, under the Seventh Circuit's approach, the courts are directed to consider a number of "relevant factors," including "the number and variety of predicate acts and the length of time over which they are committed, the number of victims, the presence of separate schemes and the occurrence of distinct injuries." *Morgan*, 804 F.2d at 975.

The *Morgan* court characterized this fact-based rule as a "middle course," *id.*, between a rule requiring proof of more than one criminal scheme, such as the Eighth Circuit's *Superior Oil* rule, and the *Ianniello-Weisman* rule, which allows proof of a pattern by any two racketeering acts, however unrelated they may be.[4] The Tenth Circuit and numerous district courts have also adopted this "middle course." *See, e.g., Torwest, supra; Frankart Distributors, Inc. v. RMR Advertising*, 632 F. Supp. 1198 (S.D.N.Y. 1986).

The foregoing discussion outlines in general terms the conflict now prevailing in the lower courts concerning the definition of a RICO "pattern." This conflict is discussed in much greater detail in the petition for certiorari to be filed by codefendant Chester Cohen. Pursuant to Supreme Court Rule 19.4, petitioners join in that petition, and respectfully direct the Court's attention to the Chester Cohen petition for a more in-depth treatment of the "pattern" issue. It is apparent from even a cursory examination of the issue, however, that the holding in this case is a complete anomaly among post-*Sedima* decisions. The Second Circuit's erroneous adherence to its pre-*Sedima*, *Weisman* decision should be corrected by this Court.

Moreover, the fact that other courts that have considered the "pattern" issue in light of *Sedima* have been

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[4] The Seventh Circuit's statements in *Morgan* with respect to the continued viability of the "any two acts" pattern rule stand in stark contrast to the Second Circuit's holding in this case. The *Morgan* court stated:

> We acknowledge that subsequent to the Supreme Court's opinion in *Sedima*, the mere commission of two or more predicate acts within ten years of one another does not automatically constitute a pattern of racketeering activity. To the degree that, prior to *Sedima*, we said that two predicate acts invariably constitute a pattern of racketeering activity, *e.g., United States v. Witherspoon*, 581 F.2d 595, 602 (7th Cir. 1978), such statements are no longer valid.

804 F.2d at 975.

unable to arrive at a uniform definition provides a further reason for granting this petition. Review in this case would allow this Court both to correct the error committed by the Second Circuit and to enunciate an interpretation of the RICO "pattern of racketeering" element that can be applied by all the lower federal courts.

The second reason for granting review in this case relates to the district court's charge. The Second Circuit's reaffirmance of *Weisman* essentially foreclosed any challenge to the charge, as the district court's RICO instructions closely tracked the law as set out in *Weisman*. However, the Second Circuit in this case commented in *dicta* that any error in the district court's charge was at most harmless, because in its opinion the charge embodied the principles of *Sedima*. Since this statement, if true, would obviously undermine the need for review by this Court, we discuss the charge in some detail below in order to show that the lower court was simply wrong on this point.

The jury in this case was told quite clearly that it need only find commission of, or a conspiracy to commit, two racketeering acts in order to conclude that the "pattern" element of the RICO charges had been satisfied. At the outset, the court instructed the jury that "a pattern of racketeering activity means two or more acts in violation of federal criminal laws undertaken in aid of the affairs of the enterprise." (T. 3036) Later, in enumerating the elements the jury had to find in order to convict on the RICO conspiracy count, the court stated: "To establish [the pattern] element, the government must prove beyond a reasonable doubt that, during the course of his association with the enterprise, the defendant conspired to commit at least two acts of racketeering specified in the indictment in the conduct of the affairs of an enterprise." (T. 3040) The same language was repeated in the instructions on the substantive RICO count, except the jury was told that to convict on that count it had to find that the defendant in question actually committed, or aided and abetted the commission

of, two racketeering acts. (T. 3060-61) Nowhere in its charge did the court instruct the jury to consider the relatedness and continuity of the racketeering acts, or the extent to which the acts were done with similar methods, purposes, participants, results, or victims.

The Second Circuit's belief that the charge met the dictates of *Sedima* apparently was based on the district court's instructions that there must be a "core of personnel who function as a continuing unit" (T. 3038, 3039, 3058), and that there must be "at least some connection between the defendant's illegal acts and the affairs of the enterprise" (T. 3061). This language, however, was part of the court's charge on the "enterprise" element of the RICO statute, and was derived directly from *Weisman*, whose continued validity is very questionable in light of *Sedima*. This portion of the charge examined only the question whether the *enterprise* is continuous and whether the individual criminal acts were in aid of the *enterprise*, and, contrary to the Second Circuit's assertion, did not meet the concerns raised in *Sedima* with respect to the *pattern* element.

Under the district court's charge, and the Second Circuit's decision upholding it, the characteristics of a "pattern" discussed in *Sedima* are subsumed within the "enterprise" requirement. (13a-15a) This melding of distinct statutory elements not only runs afoul of *Sedima*, but also of this Court's decision in *United States v. Turkette*, 452 U.S. 576 (1981). In *Turkette*, this Court made clear that the "pattern of racketeering" element of a RICO violation is entirely separate and distinct from the "enterprise" element. The Court stated:

> In order to secure a conviction under RICO, the Government must prove both the existence of an "enterprise" and the connected "pattern of racketeering activity." The enterprise is an entity, for present purposes a group of persons associated together for a common purpose of engaging in a course of conduct. The pattern of racketeering activity is, on the other hand, a series of criminal

> acts as defined by the statute. . . . While the proof used to establish these separate elements may *in particular cases* coalesce, proof of one does not necessarily establish the other.

452 U.S. at 583 (emphasis added). The approach adopted by the Second Circuit, however, provides that *in every case* the continuity and relatedness of racketeering acts necessary to constitute a RICO "pattern" are supplied by the concept of an "enterprise" to which the acts must be tied. (14a-15a) This position is incorrect under controlling Supreme Court precedent, and that error should be corrected by this Court.

Finally, the question presented, apart from being one as to which the Courts of Appeals have disagreed, is of sufficient importance to warrant this Court's attention. The holding of the Second Circuit applies equally to civil and criminal RICO cases. Civil RICO lawsuits have proliferatred in the federal courts with alarming speed,[5] a fact noted by both the majority and dissenters in *Sedima*, 105 S. Ct. at 3277-78 n.1; *id.* at 3293 (Marshall, J., dissenting), while federal prosecutors have in recent years made increasing use of the criminal RICO statute. In the wake of *Sedima*, the "pattern of racketeering" issue has become the foremost point of controversy in RICO cases. *Schaafsma*, 641 F. Supp. at 578. However, despite the efforts of most courts to fashion a "meaningful concept" of pattern, the lower courts have been unable to agree on a uniform definition of this critically important element of the RICO statute. The issue has been sufficiently debated in the two years since *Sedima*, and the time is now ripe for this Court to eliminate the confusion now reigning in the lower federal courts by announcing a definitive holding as to the proper definition of a "pattern of racketeering." This case presents the perfect vehicle for such a holding, and a writ of

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[5] The decision in this case raises the unhappy spectre of forum-shopping by civil RICO plaintiffs eager to take advantage of the expansive definition of "pattern" adopted by the Second Circuit.

certiorari should therefore issue to review the decision of the United States Court of Appeals for the Second Circuit.

Conclusion

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDICES

Appendix A
Opinion of the United States Court of Appeals

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Nos. 1407, 1411, 1400, 1401, 1408, 1402, 1403, 1409, 1410
August Term, 1985

(Argued July 14, 1986 Decided December 4, 1986)

Docket Nos. 86-1088, -1089, -1090, -1091, -1092, -1093, -1102, -1109, -1110

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

— v. —

MATTHEW IANNIELLO, BENJAMIN COHEN, PAUL GELB, ALFRED IANNIELLO, CARL MOSKOWITZ, MORTON WALKER, CHESTER COHEN, BERNARD KURTZ, and SOL GOLDMAN,
Defendant-Appellants.

Before:

WINTER and MAHONEY, *Circuit Judges*, and LASKER, *District Judge.**

Appeal from judgments of conviction of the United States District Court for the Southern District of New York.

Affirmed.

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* The Honorable Morris E. Lasker, Senior District Court Judge of the United States District Court for the Southern District of New York, sitting by designation.

Appendix A
Opinion of the United States Court of Appeals

MARK F. POMERANTZ, New York, New York (Fischetti & Pomerantz, Jay Goldberg, New York, New York of counsel) *for Appellant Matthew Ianniello.*

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JOHN L. POLLOK, New York, New York (Hoffman, Pollok & Gasthalter, of counsel) *for Appellant Paul Gelb.*

MARK A. SUMMERS, New York, New York (Hoffman, Pollok & Gasthalter, of counsel) *for Appellant Alfred Ianniello.*

DEBORAH A. SCHWARTZ, New York, New York (Gustave H. Newman, P.C., of counsel) *for Appellant Carl Moskowitz.*

PAUL A. GOLDBERGER, New York, New York *for Appellant Morton Walker.*

EUGENE NEAL KAPLAN, New York, New York (Kaplan, Thomashower & Landau, of counsel) *for Appellant Chester Cohen.*

SOL GOLDMAN, Flushing, New York, *pro se.*

JUDD BURSTEIN, New York, New York, *Attorney at Trial for Appellant Sol Goldman.*

GERALD B. LEFCOURT, New York, New York (Gerald B. Lefcourt, P.C., of counsel) *for Appellant Bernard Kurtz.*

JAMES RATHER, New York, New York *for Appellee United States of America.*

Appendix A
Opinion of the United States Court of Appeals

MAHONEY, *Circuit Judge:*

Defendants appeal from judgments entered upon their convictions by a jury in the Southern District of New York, raising a number of issues. We affirm, and discuss only the questions concerning the construction of the indictment, the definition of a pattern of racketeering activity under the Racketeer Influenced and Corrupt Organizations Act, Pub. L. No. 91-452, tit. IX, 84 Stat. 941 (codified as amended at 18 U.S.C. §§ 1961-1968 (1982 & Supp. III 1985)) ("RICO"), the elements of mail fraud based upon fraud on the New York State Liquor Authority ("SLA") and state tax authorities, the effect of the Twenty-First Amendment on the federal government's ability to regulate the mails, and the corroboration necessary to convict on a co-conspirator's statement.

The indictment alleged, *inter alia*, a broad conspiracy to violate RICO, substantive violations of RICO, mail fraud, bankruptcy fraud and tax evasion.

At trial, the government established[1] that the defendants were part of a group that skimmed profits from bars and restaurants that they owned and operated in New York City. Matthew Ianniello and Benjamin Cohen[2] directed the enterprise's activities, supervising and overseeing its affairs from offices in Manhattan.[3] While they received the greatest profits from its operations, the bars and restaurants ostensibly were owned and managed by others, who acted as "fronts" for Ianniello and Cohen.

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[1] The government's case was built primarily on electronic audio and video surveillance at the offices of Matthew Ianniello and Benjamin Cohen at C & I Trading, which were at 135 West 50th Street in Manhattan. The operations of the group were directed from C & I Trading. The surveillance was conducted from September 7, 1982 to December 27, 1982.

[2] References to "Ianniello" and "Cohen" are to Matthew Ianniello and Benjamin Cohen respectively.

[3] See *supra* note 1.

As part of the scheme to skim money, the defendants obtained liquor licenses from the SLA for the businesses. Ianniello's and Cohen's financial interests in and receipt of money from the bars and restaurants were concealed from the SLA. This eased the granting of the liquor licenses and made the skimming more difficult to detect.

In addition, the scheme included a plan to defraud the New York State Department of Taxation and Finance (the "Department") by understating gross receipts in sales tax returns. Further, the defendants defrauded the legitimate creditors of the Peppermint Lounge, one of the enterprises involved in this operation,[4] by skimming its receipts while the bar was in bankruptcy proceedings. Finally, various of the recipients of the skimmed cash receipts failed to pay personal income taxes on those receipts.

A lawyer and accountant also participated. Carl Moskowitz ("Moskowitz"), the lawyer, prepared false liquor license applications that were submitted to the SLA for the Mardi Gras, the Haymarket, the Grapevine and the Peppermint Lounge.[5] Sol Goldman ("Goldman"), the accountant, helped conceal the skimming and diversion of income from the Peppermint Lounge, the New Peppermint Lounge and Umberto's Clam House through false books and records, and prepared and filed false state tax returns for the same enterprises. Goldman also assisted in the bankruptcy fraud committed during the bankruptcy proceedings of the Peppermint Lounge.

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[4] The Peppermint Lounge was also known at various times as the "Hollywood" and "G.G. Barnum's." The other establishments involved were the "Mardi Gras," the "Haymarket," the "Grapevine," "Umberto's Clam House" and the "New Peppermint Lounge," also known as the "Electric Circus" prior to its acquisition by certain of the defendants herein, all at various locations in Manhattan, New York City.

[5] Moskowitz maintained an office at C & I Trading, for which he paid no rent.

The most profitable business was P & G Funding Corp., which operated the Mardi Gras. The bar opened in January, 1979, and for the first two years of its operation the owners of record were Paul Gelb and his wife, Pauline Gelb.[6] Subsequently, Pauline Gelb became the sole owner of record. From the time the Mardi Gras opened its doors in 1979, Ianniello, Cohen and Gelb regularly skimmed its cash receipts, dividing the money equally among themselves. By the end of 1982, the defendants had divided over $2 million in unreported income.

The original liquor license application prepared by Moskowitz and filed by the Mardi Gras with the SLA in October 1978 stated that no one other than Paul Gelb and Pauline Gelb had a financial interest in the Mardi Gras or would share in the receipts of the bar, hiding Ianniello's and Cohen's stake in the Mardi Gras. This was repeated in the later liquor license renewal applications. These defendants also concealed their skimming at the Mardi Gras from the Department by understating the bar's true gross receipts.

The record owner of Osbro Restaurant, Inc., which did business as "Umberto's Clam House," was Robert Ianniello,[7] and the restaurant was managed by Oscar Ianello.[8] Their two brothers, Matthew Ianniello and Alfred Ianniello, however, controlled the business and skimmed its receipts. Liquor license renewal applications filed with the SLA did not disclose Matthew Ianniello's interest in Umberto's Clam House. The books and records of the restaurant, kept by Goldman, concealed the skimming by showing false receipts and

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[6] Pauline Gelb was indicted and tried. Judge Weinfeld entered a judgment of acquittal for her at the close of the government's case. References to "Gelb" are to Paul Gelb.

[7] Robert Ianniello was granted an order of acquittal at the close of the government's case.

[8] Oscar Ianello was acquitted by the jury at trial on all counts.

expenses. The sales tax return for the period September through November 1982 also understated the true receipts of the restaurant, as well as the amount of sales tax due.

The "Peppermint Lounge," Mar-Jear Restaurant, Inc., was a bar and nightclub located in Manhattan. While ostensibly owned by Herbert Taylor ("Taylor"), the bar was controlled by Ianniello and Cohen, who skimmed cash from the receipts of the bar. Bernard Kurtz ("Kurtz") was the manager. Kurtz made the major management decisions, particularly regarding money and expenses. In the fall of 1980, Kurtz hired Frank Rocchio ("Rocchio"), his niece's husband, to book bands for the bar. The bar paid for the bands hired by Rocchio.

By the spring of 1982, the Peppermint Lounge had been closed down a number of times by the New York City Fire Department because of overcrowding. As a result, the Peppermint Lounge moved into the physical facilities of a larger bar and nightclub, which at the time was called the "Electric Circus," whose corporate identity was Circus Disco, Ltd. The name of the "Electric Circus" was changed to the "New Peppermint Lounge."

The facilities of the new nightclub, which operated under a similar format and with essentially the same personnel as the old Peppermint Lounge, were purchased from George Vallario, Jr., Nicholas Orlando and their partners by Kurtz, on behalf of Ianniello and Cohen. The sale was concealed from the SLA, and the New Peppermint Lounge opened for business on May 26, 1982. In the fall of 1982, Kurtz stopped making the weekly payments due to the Vallario group on the purchase of the bar. Shortly thereafter, the Vallario group repossessed the bar from Kurtz.

The defendants skimmed the admission charges at both the Peppermint Lounge and the New Peppermint Lounge. For example, in February 1982, Goldman wrote

a letter to the Department "concerning the taxable status of admission charges to a disco and bar." The Department's Sales Tax Instructions and Interpretations Unit responded that the sales tax applied to such charges. Shortly after this, the defendants formed Rock-eo Entertainment, Ltd., named after Rocchio, to divert admission receipts from the New Peppermint Lounge. In a contract between Rock-eo Entertainment and Circus Disco, Rock-eo Entertainment agreed to provide the music as an independent contractor for Circus Disco. Under the terms of the agreement, Rock-eo Entertainment had complete control over the promotion of music at the New Peppermint Lounge and was obligated to pay all expenses in that regard. The expenses were to be paid from the door receipts, which Rock-eo Entertainment was obligated to collect. The excess door receipts were to be Rock-eo Entertainment's profit. In reality, however, Rock-eo Entertainment was wholly controlled by the defendants; admission charges collected at the New Peppermint Lounge went to the defendants, not to Rock-eo Entertainment.

The defendants had also skimmed the admission receipts at the old Peppermint Lounge by failing to report any income from performances by bands. When audited, defendants argued that the receipts were for concerts, and thus were not subject to sales tax.

At the same time the defendants were skimming money from the Peppermint Lounge, the bar was in Chapter 11 bankruptcy proceedings. The Bankruptcy Court, at the request of the record owner Taylor, authorized the Peppermint Lounge to retain Goldman as its accountant in connection with the bankruptcy proceedings. One of Goldman's responsibilities was to prepare the monthly financial statements or operating reports to be filed with the Bankruptcy Court. Those reports, like the bar's books and records, understated the bar's receipts, concealing the skimming by the defendants.

While the bar was in liquidation proceedings, Cohen and Kurtz also took a worker's compensation insurance refund check payable to the Peppermint Lounge and used it to pay an insurance premium owed by the New Peppermint Lounge.

Ianniello and Cohen also controlled the "Haymarket" and the "Grapevine," once again through Kurtz. Cohen's son, Chester Cohen, held the license for the "Haymarket," while Morton Walker held the license at the "Grapevine." As with the other businesses in which Ianniello and Cohen maintained hidden interests, the purpose of their control of these two bars was to skim their receipts, avoid the payment of sales tax thereon by the corporate owners of the bars, and avoid the payment of personal income tax on the skimmed receipts by the recipients thereof.

Ianniello and Gelb were the only defendants to present witnesses, though Ianniello and other defendants presented various documentary evidence as well. Ianniello called Internal Revenue Service Special Agent John Ryan, who had testified on behalf of the government. Through Agent Ryan, Ianniello introduced a number of checks paid by C & I Trading to Ianniello during 1982. The checks, which totaled $17,500, were each for $500, and many of them had been cashed. Those falling within the period of the electronic surveillance numbered eight and totaled $4,000.

Gelb called Thomas O'Toole, who testified that in his opinion Gelb had an excellent general reputation, though O'Toole knew nothing about the facts of the case.

All appellants were convicted of conspiracy to violate RICO, and a substantive violation of RICO. Ianniello was also convicted of thirty-five counts of mail fraud and six counts of tax evasion. Cohen was convicted of thirty-five counts of mail fraud, twelve counts of bankruptcy fraud and six counts of tax evasion. Gelb was convicted

of nineteen counts of mail fraud and six counts of tax evasion. Kurtz was convicted of sixteen counts of mail fraud and twelve counts of bankruptcy fraud. Walker and Chester Cohen were convicted of two counts of mail fraud. Moskowitz was convicted of eleven counts of mail fraud. Goldman was convicted of eight counts of mail fraud and twelve counts of bankruptcy fraud. Alfred Ianniello was convicted of three counts of mail fraud.

The Indictment

The defendants contend that the prosecution and the court below constructively amended the mail fraud counts of the indictment. The indictment charged mail fraud on both the SLA and the Department. The goals of those frauds are in dispute.

The indictment's first two counts alleged a conspiracy to violate and substantive violation of RICO. In those counts, the broad goals and purposes of the enterprise were stated to be to obtain liquor licenses through false information, skim profits, evade taxes and defraud the creditors of a bankrupt company. Indictment Paragraphs 2-9. The indictment then set out the mail fraud and bankruptcy fraud counts, which also served as the RICO predicate acts. Some of the mail fraud counts fail to allege the exact pecuniary goal of the fraud—stating generally that it was part of a scheme to defraud.

The government and the court below interpret the indictment to charge a broad scheme to skim profits and evade taxes on the restaurants and bars. *See United States v. Ianniello,* 621 F. Supp. 1455, 1474 (S.D.N.Y. 1985). Defendants argue, however, that the counts alleging mail fraud on the SLA charge only that they caused false applications and renewal applications for liquor licenses to be submitted to the SLA. Accordingly, they contend, no intent to reap pecuniary benefit or loss was charged by the indictment, requiring dismissal of

those counts. *See United States v. Regent Office Supply Co.*, 421 F.2d 1174, 1180-81 (2d Cir. 1970).[9] Grafting the broad allegations from the RICO counts onto the individual mail fraud counts, they further argue, would violate the rule that "[e]ach count in an indictment is regarded as if it was a separate indictment." *United States v. Fulcher*, 626 F.2d 985, 988 (D.C. Cir.), *cert. denied*, 449 U.S. 839 (1980).

Each count does allege, however, that the defendants participated in a scheme to defraud. The argument that it is impermissible at trial to alter the goal of the scheme as stated in the indictment is foreclosed by *United States v. Weiss*, 752 F.2d 777 (2d Cir.), *cert. denied*, 106 S. Ct. 308 (1985). In that case, the goal charged was personal enrichment; the goal upon which the defendant was tried and convicted was the creation of a corporate "slush" fund. *See Weiss*, 752 F.2d at 786; *id.* at 791 (Newman, J., dissenting). *A fortiori*, if the goal can be completely changed by proof at trial, it can be made more specific at trial. Moreover, the defendants in this case had ample notice of the core of the charges against them, *see United States v. Heimann*, 705 F.2d 662, 666 (2d Cir. 1983); *United States v Sindona*, 636 F.2d 792, 797-98 (2d Cir. 1980), *cert. denied*, 451 U.S. 912 (1981), because the theory of the prosecution was stated in the RICO conspiracy counts, and in deciding pretrial motions Judge Weinfeld made the exact nature of the charges clear to the defense. *See United States v. Ianniello*, 621 F. Supp. 1455, 1473-75 (S.D.N.Y. 1985). Even if this were not the case, however, assertions of prejudice from variance would be unavailing, since the defense of the RICO allegations necessarily defended against the SLA mail

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[9] The government does not argue that the convictions with respect to the SLA counts are sustainable on any theory of fiduciary obligation. *See United States v. Weiss*, 752 F.2d 777, 783-84 (2d Cir.), *cert. denied*, 106 S. Ct. 308 (1985); *United States v. Margiotta*, 688 F.2d 108, 121 (2d Cir. 1982), *cert. denied*, 461 U.S. 913 (1983).

fraud counts which were listed as RICO predicate acts. *See Berger v. United States*, 295 U.S. 78, 82 (1935); *Sindona*, 636 F.2d at 798-99.

Pattern Requirement of RICO

Appellants contend that *United States v. Weisman*, 624 F.2d 1118 (2d Cir.), *cert. denied*, 449 U.S. 871 (1980), which held that two predicate acts can suffice to satisfy the pattern requirement of RICO,[10] should be reconsidered in light of the Supreme Court's dictum in a footnote in *Sedima, S.P.R.L. v. Imrex Co.*, ____ U.S. ____ , ____ n.14, 105 S. Ct. 3275, 3285 n.14 (1985).[11]

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[10] Each substantive RICO subsection, 18 U.S.C. § 1962(a)-(c) (1982), requires a pattern or collection of an unlawful debt (which is not applicable to this case). A pattern of racketeering activity, as defined in the statute, "requires at least two acts of racketeering activity, one of which occurred after the effective date of this chapter and the last of which occurred within ten years (excluding any period of imprisonment) after the commission of a prior act of racketeering activity." 18 U.S.C. § 1961(5) (1982).

[11] The footnote states:

> As many commentators have pointed out, the definition of a "pattern of racketeering activity" differs from the other provisions in § 1961 in that it states that a pattern "*requires* at least two acts of racketeering activity," § 1961(5) (emphasis added), not that it "means" two such acts. The implication is that while two acts are necessary, they may not be sufficient. Indeed, in common parlance two of anything do not generally form a "pattern." The legislative history supports the view that two isolated acts of racketeering activity do not constitute a pattern. As the Senate Report explained: "The target of [RICO] is thus not sporadic activity. The infiltration of legitimate business normally requires more than one 'racketeering activity' and the threat of continuing activity to be effective. It is this factor of *continuity plus relationship* which combines to produce a pattern." S.Rep. No. 91-617, p. 158 (1969) (emphasis added). Similarly, the sponsor of the Senate bill, after quoting this portion of the Report, pointed out to his colleagues that "[t]he term 'pattern' itself requires the showing of a relationship. . . .
>
> *(footnote continued on following page)*

Citing legislative history, that footnote indicates that a combination of relationship and continuity between separate acts is required to establish a pattern. Two acts are to be considered as necessary but not sufficient to constitute a pattern. *Id.*; 18 U.S.C. § 1961(5) (1982).

This court is bound by a decision of a prior panel unless and until its rationale is overruled, implicitly or expressly, by the Supreme Court or this court *en banc*. *See In re Jaylaw Drug, Inc.*, 621 F.2d 524, 527 (2d Cir. 1980); *Boothe v. Hammock*, 605 F.2d 661, 663-64 (2d Cir. 1979). Because the *Sedima* footnote does not rise to the level of holding, it is not controlling. It would be particularly inappropriate in this case, however, to reconsider *Weisman*, since that case carefully and thoughtfully addressed the concerns later considered by the Supreme Court in the *Sedima* footnote. *See Weisman*, 624 F.2d at 1121-23. There is no indication in that footnote that the Supreme Court had considered and rejected the *Weisman* analysis.

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> So, therefore, proof of two acts of racketeering activity, without more, does not establish a pattern. . . ." 116 Cong.Rec. 18940 (1970) (statement of Sen. McClellan). See also *id.* at 35193 (statement of Rep. Poff) (RICO "not aimed at the isolated offender"); House Hearings, at 665. Significantly, in defining "pattern" in a later provision of the same bill, Congress was more enlightening: "criminal conduct forms a pattern if it embraces criminal acts that have the same or similar purposes, results, participants, victims, or methods of commission, or otherwise are interrelated by distinguishing characteristics and are not isolated events." 18 U.S.C. § 3575(e). This language may be useful in interpreting other sections of the Act. Cf. *Iannelli v. United States*, 420 U.S. 770, 789, 95 S. Ct. 1284, 1295, 43 L.Ed.2d 616 (1975).

105 S. Ct. at 3285 n.14.

Under *Weisman*, relatedness is supplied by the concept of "enterprise" expressed in section 1962(c)[12] and the ten year requirement of section 1961(5). The link between the acts is supplied by the fact that "the predicate acts constituting a 'pattern of racketeering activity' must all be done in the conduct of the affairs of an 'enterprise.'" *Id.* at 1122. This also supplies the necessary element of continuity, since an enterprise is a continuing operation. *See United States v. Turkette*, 452 U.S. 576, 583 (1981); *see also Moss v. Morgan Stanley Inc.*, 719 F.2d 5, 21-22 (2d Cir. 1983) (section 1962(c) requires relation between enterprise and pattern), *cert. denied*, 465 U.S. 1025 (1984). Thus, it would appear that the difference between *Weisman* and *Sedima* is one of form and not of substance.[13]

In fact, support for this view of the case is found in Judge Weinfeld's charge, which met the dictates of *Weisman* and the suggestion of *Sedima*. The jury was instructed at several points that the acts must be related to the enterprise and to a continuous activity. Transcript 3036, 3037-44, 3058, 3061. Thus, any failure to charge in precisely the language contemplated by *Sedima* would be at most harmless error.

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[12] Section 1962(c) provides:

> It shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate, or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity or collection of unlawful debt.

18 U.S.C. § 1962(c) (1982). The term "enterprise" also appears in subsections (a) and (b) of section 1962.

[13] Other circuits have also treated the *Sedima* dictum as not marking a sharp departure in the law. *See, e.g., Bank of America National Trust & Savings Association v. Touche Ross & Co.*, 782 F.2d 966, 970-71 (11th Cir. 1986); *R.A.G.S. Couture, Inc. v. Hyatt*, 774 F.2d 1350, 1355 (5th Cir. 1985). *But see Superior Oil Co. v. Fulmer*, 785 F.2d 252, 254-58 (8th Cir. 1986).

Discrete Versus Continuous Criminal Activity

It is also claimed that Chester Cohen was improperly convicted under section 1962(c) of two predicate acts which did not constitute a pattern of racketeering activity within the meaning of the statute. Chester Cohen was convicted on mail fraud predicate acts which, in turn, were based on deceptive license renewal applications in successive years to the SLA for the same establishment.[14] This, he argues, is a single, discrete crime which cannot, as a matter of law, constitute a pattern.

A distinction has been drawn in some cases between crimes aimed at a discrete goal, singular in time and in instance, and crimes committed to further continuing criminal activity. *Compare Professional Assets Management, Inc. v. Penn Square Bank*, 616 F. Supp. 1418, 1420-22 (W.D. Okla. 1985) (fraudulent preparation of an audit report is a single instance and therefore crimes to further that goal are not a pattern) *with Rush v. Oppenheimer & Co.*, 628 F. Supp. 1188, 1198-1200 (S.D.N.Y. 1985) (multiple instances of churning of a single account, together with related misrepresentations and deceptions, constitute a pattern).

This distinction is derived from the *Sedima* Court's suggestion of relatedness and continuity. *See Soper v. Simmons International, Ltd.*, 632 F. Supp. 244, 250-54 (S.D.N.Y. 1986) (discussing evolution of case law dealing with this question since *Sedima*). As discussed above, we believe that the inquiry as to relatedness and continuity is best addressed in the context of the concept of "enterprise" expressed in section 1962(c), and to a lesser extent, the ten year requirement of section 1961(5). An enterprise is "a group of persons associated together for a common purpose of engaging in a course of conduct" and "is proved by evidence of an ongoing organization, formal

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[14] Walker and Alfred Ianniello were convicted on similar facts, and adopted Chester Cohen's argument on this point.

or informal, and by evidence that the various associates function as a continuing unit." *United States v. Turkette*, 452 U.S. 576, 583 (1981). This circuit requires that, under section 1962(c), the enterprise be a continuing operation and that the acts be related to the common purpose. *See Moss v. Morgan Stanley, Inc.*, 719 F.2d 5, 21-22 (2d Cir. 1983), *cert. denied*, 465 U.S. 1025 (1984); *United States v. Mazzei*, 700 F.2d 85, 89 (2d Cir.), *cert. denied*, 461 U.S. 945 (1983). This result derives from the language of section 1962(c), which requires that the pattern of predicate acts be done in the conduct of the affairs of the enterprise. *See Weisman*, 624 F.2d at 1122. Thus, an enterprise with "a single purpose," here fraud continuing indefinitely, can provide the basis for a section 1962(c) violation. The common purpose in this case was to skim profits and had no obvious terminating goal or date, clearly establishing the enterprise requirement.

The Eighth Circuit has adopted a contrary view in *Superior Oil Co. v. Fulmer*, 785 F.2d 252 (8th Cir. 1986), holding that "one continuing scheme to convert gas from [a] pipeline" did not provide the " 'continuity' sufficient to form a 'pattern of racketeering activity.' " *Id.* at 257. That circuit now requires as part of the definition of pattern proof that the defendants engaged in more than one scheme. *Id. But see Alexander Grant and Co. v. Tiffany Industries, Inc.*, 770 F.2d 717, 718 & n.1 (8th Cir. 1985) (post-*Sedima* decision, upholding as a pattern a series of predicate acts with the goal of obtaining a favorable audit), *cert. denied*, 106 S. Ct. 799 (1986). We conclude that forcing such a result from the word "pattern" is a strained and inappropriate reading of the statutory language.[15] Furthermore, it would appear

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[15] A variant of the *Superior Oil* approach construes *Sedima* to require multiple "episodes" of criminal activity in order to establish a section 1962(c) pattern. *See, e.g., Frankart Distributors, Inc. v. RMR Advertising, Inc.*, 632 F. Supp. 1198, 1201 (S.D.N.Y. 1986) (multiple

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that a requirement of multiple schemes would undercut section 1962(b), which states:

> It shall be unlawful for any person through a pattern of racketeering activity or through collection of an unlawful debt to acquire or maintain, directly or indirectly, any interest in or control of any enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce.

18 U.S.C. § 1962(b) (1982). This provision does not prohibit an enterprise which is committing predicate acts; rather it prohibits predicate acts which are aimed at taking over an enterprise. *See United States v. Cauble*, 706 F.2d 1322, 1331 n.11 (5th Cir. 1983), *cert. denied*, 465 U.S. 1005 (1984). It prohibits one scheme to acquire an interest in an interstate enterprise. To require two schemes as part of the *definition* of pattern under section 1961(5) would effectively eliminate this provision.[16]

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acts of mail fraud relating to performance of a single contract did not constitute a pattern); *Soper v. Simmons International, Ltd.*, 632 F. Supp. 244, 250-255 (S.D.N.Y. 1986) (multiple acts of wire and mail fraud concerning commissions allegedly due with respect to a joint venture did not constitute a pattern). Other recent cases in the Southern District of New York reject the multiple episode requirement, contending that it goes beyond any requirement or legitimate implication of the *Sedima* footnote and provides a vague and unpredictable rule of decision. *See Bankers Trust Co. v. Feldesman*, No. 82 Civ. 5590 (WCC), slip op. at 17-20 (S.D.N.Y. Sept. 3, 1986); *see also Conan Properties, Inc. v. Mattel, Inc.*, 619 F. Supp. 1167, 1170-71 (S.D.N.Y. 1985). We agree with the latter view on both counts. As *Sedima* makes clear, 105 S. Ct. at 3287, any further narrowing of RICO, however appropriate that may be, is a job for Congress, not the courts.

[16] It should also be noted that the section 1961(5) definition of pattern requires at least two acts of racketeering activity, not two schemes. "Racketeering activity" is in turn defined as various statutory violations in section 1961(1), which has no language requiring a scheme. *See* 18 U.S.C. § 1961(1) (1982). Clearly then, the multiple

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We decline to embrace this incongruous result. Instead, we hold that when a person commits at least two acts that have the common purpose of furthering a continuing criminal enterprise with which that person is associated, the elements of relatedness and continuity which the *Sedima* footnote construes section 1962(c) to include are satisfied. In this regard, we note that a recent opinion of this court similarly construes *Sedima* footnote fourteen. *See United States v. Teitler*, 802 F.2d 606, 611-12 (2d Cir. 1986); *see also Morgan v. Bank of Waukegan*, No. 85-2675 (7th Cir. Oct. 13, 1986) (available Nov. 15, 1986 on LEXIS, Genfed Library, USApp file) (collecting cases).

SLA Mail Fraud

The defendants also argue that the SLA mail fraud convictions must fall because the SLA original application and renewal forms were too ambiguous to support a finding of intent. *See United States v. Gelb*, 700 F.2d 875, 879 (2d Cir.), *cert. denied*, 464 U.S. 853 (1983). We disagree. Defendants base their contention on what they term the "confused" testimony of a prosecution expert on the requirements of the forms. However clever defense counsel's cross-examination of the prosecution's witness was, it cannot, and indeed did not, overcome the clarity of those documents themselves.

The original application asks:

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scheme requirement is not grounded in the statutory language of RICO. Nor are we directed to any clear legislative history to indicate that when, for example, Congress listed mail fraud as an act, it meant only "scheme-like" fraud. To impose such an element, therefore, violates the Supreme Court's admonition against adding requirements not grounded in the statute or the legislative history. *See United States v. Turkette*, 452 U.S. 576, 593 (1981); *see also Sedima, S.P.R.L.*, 105 S. Ct. at 3285, n.13 (where legislative history was silent, court below should have followed plain language of statute).

> Has any person not an applicant herein, or, if a corporate applicant, any person not an officer, director or stockholder of such corporation, any interest, financial, proprietary or other, direct or indirect, in the premises or in the business to be licensed, or has made any loan to the applicant for said business or has any lien of mortgage on the fixtures in the business?
>
> . . . .
>
> State whether any person not an applicant herein, or if a corporate applicant, any person not an officer, director or stockholder of such corporation, or any person not reported in [the above question], shares or will share on a percentage basis or in any way in the receipts, losses or deficiencies of the business, to any extent whatsoever other than by fixed salary.

The renewal form asks for the details of any change in fact since the original application was filed. The licensee then represents by signing that "all statements made in the original application for this license and in any and all applications for renewal thereof are true and correct, except as modified in subsequent renewal applications or as otherwise reported . . . ." This language, in context, requires an update of the original application and further requires the licensee to swear that all information recorded with the SLA reflects the current status of the licensee business.

Sales Tax Mail Fraud

Defendants complain that the court below failed to properly charge the jury on the mail fraud counts relating to sales tax evasion. Judge Weinfeld charged that the defendants could be found guilty if the jury found that the stated gross receipts were false or that the reported

amount of sales tax due was understated. It is asserted that this allowed the jury to convict even if no tax was due. Assuming this to be true, it is not error.[17]

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[17] Defendants also claim error with respect to the district judge's charge on the question whether admission receipts at the Peppermint Lounge and the New Peppermint Lounge were subject to sales tax. We disagree. The judge charged the jury that:

> In determining whether or not the sale of beverages was merely incidental to the presentation of live musical performances at the Peppermint Lounge and New Peppermint Lounge, you may take into account: the number and size of bars within the facilities, whether or not beverages were available during periods when live performances were not presented, whether or not admission was charged at times during which there were no live musical performances, whether or not musical performances were emphasized in the advertising done by the Peppermint Lounge and the New Peppermint Lounge, and the relative proportion of the revenue produced by admission charges and by the sale of beverages.

Defendants contend that the definition of "merely incidental" is derived from the now repealed federal tax on cabarets. *See In re Tralfamadore Cafe, Inc.*, Advisory Op. TSB-A-85(42)S, at 2 (NYSDTF Taxpayer Services Div. Sept. 9, 1985). Defendants argue that the judge should have instructed the jury that, while the other factors should be considered, the primary factor in this determination is the ratio between the admissions revenues and the sales revenues, citing the *Tralfamadore* advisory opinion.

Assuming this to be so, the evidence against defendants on this score was overwhelming, making any error harmless. *See United States v. Terry*, 702 F.2d 299, 313 (2d Cir.), *cert. denied*, 461 U.S. 931 (1983); *United States v. Finkelstein*, 526 F.2d 517, 522 (2d Cir. 1975), *cert. denied*, 425 U.S. 960 (1976). Taking the figures most favorably to the defendants (exact amounts are difficult to calculate due to the defendants' conduct), approximately forty-two percent of revenues was derived from liquor sales alone. Where forty percent of revenue was derived from the sale of concessions and refreshments, that in itself was enough to impose the tax. *See Kantor v. United States*, 154 F. Supp. 58, 60-62 (N.D. Tex. 1956) (The issue in *Kantor* was whether the analogous federal tax would be imposed upon refreshments as well as admissions, but the statutory interpretation is nonetheless both relevant and persuasive). The bars frequently operated without

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In *Gelb*, the defendant had defrauded an insurance company by inflating his claimed losses. In the mail fraud prosecution, he argued that the government had failed to prove that his inflated statement of loss resulted in an inflated claim (*i.e.*, he claimed a loss of $684,000 where the insurance coverage was $500,000, and argued that the government had to prove false loss claims in excess of $184,000). The court held that the government need only show a specific intent to defraud. *See Gelb*, 700 F.2d at 879-80; *see also United States v. Rodolitz*, 786 F.2d 77, 80-81 (2d Cir. 1986) ("To sustain the [insurance-mail fraud] conviction, the government needed to prove only that Rodolitz employed a deceptive scheme intended to prevent the insurer from determining for itself a fair value of recovery.") Similarly, in this case the government need only show a specific intent to evade sales taxes. The evidence in the record to support such a finding was ample.

Twenty-First Amendment

The defendants also claim that the twenty-first amendment bars this mail fraud prosecution. However, the federal government's lack of direct power to regulate intrastate liquor does not necessarily imply that it cannot prosecute conduct that also implicates federal concerns. *See Parr v. United States*, 363 U.S. 370, 389 (1960) (Congress can forbid conduct through mailing in furtherance of a scheme that it regards as contrary to public policy, whether it can forbid the scheme or not, quoting *Badders v. United States*, 240 U.S. 391, 393 (1916));

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bands, and when bands did play, they performed for short periods of time. At all times, moreover, the bartenders served drinks. The bar also did not always charge for admission, apparently hoping to increase liquor revenues. The Peppermint Lounge had two dance floors and three bars, and is described as a bar in its sales tax returns.

United States v. DeFiore, 720 F.2d 757, 761-62 (2d Cir. 1983) (same in wire fraud context), *cert. denied*, 466 U.S. 906 (1984) and 467 U.S. 1241 (1984); *cf. Illinois Department of Revenue v. Phillips*, 771 F.2d 312, 317 (7th Cir. 1985) (State of Illinois was a proper plaintiff in a RICO action brought to recover treble damages for evasion of Illinois sales tax). The defense cites cases that hold that federal statutes in which liability is expressly and solely based upon violations of state liquor laws are beyond federal power, *United States v. Constantine*, 296 U.S. 287, 294 (1935); *United States v. Kesterson*, 296 U.S. 299, 300 (1935), and that state regulation of commerce in liquor pursuant to section 2 of the twenty-first amendment may be preempted by federal antitrust laws if the federal policies outweigh the state interests, *California Retail Liquor Dealers Association v. Midcal Aluminum, Inc.*, 445 U.S. 97, 113-14 (1980). Those cases do not support the proposition that the federal government cannot prosecute misuse of the mails where that misuse also violates state liquor regulations.

Corroboration of Co-conspirator's Statements

Defendants assert that the evidence of tax evasion by Ianniello, Cohen and Gelb was insufficient because it consisted largely of the uncorroborated statement of Gelb.[18] A conviction cannot be based solely on an

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[18] PAUL GELB: The whole fuckin' thing is here we cannot go ahead and have another four years here that we think we gonna be like that. You're talking about four years which, which we can very well say that we, at least we averaged out, at least a half a million dollars a year that we cut up. I would say conservatively, you understand? Which, is uh, which is easy. I would say closer to two and a half but that's alright let's say even closer to two and a half million for four years.

(footnote continued on following page)

uncorroborated extrajudicial confession. *See Opper v. United States*, 348 U.S. 84, 89-90 (1954). From this proposition, the defense extrapolates the theory that an uncorroborated admission should not be sufficient to convict.

In *Smith v. United States*, 348 U.S. 147 (1954), the Court noted that "[a]dmissions given under special circumstances, providing grounds for a strong inference of reliability, may not have to be corroborated. *Cf. Miles v. United States*, [103 U.S. 304 (1980)]." *Smith*, 348 U.S. at 155 n.3. In *Miles*, the defendant was charged with bigamy and the evidence of his first marriage was his own uncorroborated statements. *Miles v. United States*, 103 U.S. 304, 311-12 (1880). The court affirmed the conviction because there were independent indicia of reliability. *Id.* at 312.

The *Smith* Court held that the rule requiring corroboration applied to admissions when the admission is made to the authorities after the crime and it establishes an essential element of the crime. 348 U.S. at 155. This was

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(footnote continued from preceding page)

	Which, uh, we cannot go ahead and consider ourselves losers here. But you know this operation as long as it's goin who the hell wants to change it for the time being?
BEN COHEN:	I know.
PAUL GELB:	You understand? How long? I don't know, but eventually we should be thinking ahead of time what we want to do here instead. The custom, this operation is outrageous.
BEN COHEN:	I know.
PAUL GELB:	And if you do over the fifty thousand, you do over fifty thousand, it pays, you understand? Because you have to, you have to pay (UI). This, that, that but you coming out, you clean. Clean you come out fifteen thousand dollars a week.

A. 745-746.

based on a concern that admissions may be coerced or otherwise unreliable. *Id.* at 153. Thus, when corroboration is required, its aim is to ensure the reliability of the statement. *Id.* at 156-59; *see also Chambers v. Mississippi*, 410 U.S. 284, 298-301 (1973); *Donnelly v. United States*, 228 U.S. 243, 277-78 (1913) (Holmes, J., dissenting).

The proper inquiry, therefore, is whether the statements of Gelb bear independent indicia of reliability. *Cf. United States v. Rodriguez*, 706 F.2d 31, 40 (2d Cir. 1983) (in context of Federal Rule of Evidence 804(b)(3)); *United States v. Beltempo*, 675 F.2d 472, 479-80 (2d Cir.) (same), *cert. denied*, 457 U.S. 1135 (1982). The circumstances of the conversation, a discussion between Gelb and Cohen about their businesses' performances, as well as numerous deliveries of cash before and after the statement, provide that reliability. In any event, the cash deliveries provide the corroboration necessary for conviction even under the defense theory.

Conclusion

We have examined the remaining defense contentions and find them to be without merit. The judgments of conviction are accordingly affirmed.

Appendix B
Order of United States Court of Appeals On Petition for Rehearing and Suggestion for Rehearing In Banc

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

At a stated term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse, in the City of New York, on the 28th day of January, one thousand nine hundred and eighty-seven.

FILED: January 28, 1987

Nos. 86-1088, 86-1089, 86-1090, 86-1091, 86-1092, 86-1093, 86-1102, 86-1109, 86-1110

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

MATTHEW IANNIELLO, BENJAMIN COHEN, PAUL GELB, ALFRED IANNIELLO, CARL MOSKOWITZ, MORTON WALKER, CHETSER COHEN, BERNARD KURTZ and SOL GOLDMAN,
Defendants-Appellants.

Petitions for rehearing containing suggestion that the action be reheard in banc having been filed herein by counsels for the defendants-appellants, Mathew Ianniello, Benjamin Cohen, Paul Gelb, Alfred Ianniello, Carl Moskowitz, Sol Goldman, Bernard Kurtz, counsel for Morton Walker, and Counsel for Chester Cohen,

Appendix B
Order of United States Court of Appeals
On Petition for Rehearing and Suggestion for
Rehearing In Banc

Upon consideration by the panel that heard the appeal, it is

ORDERED that said petitions for rehearing are DENIED.

It is further noted that the suggestions for rehearing in banc have been transmitted to the judges of the Court in regular active service and to any other judge on the panel that heard the appeal and that no such judge has requested that a vote be taken thereon, rehearing in banc is denied.

/s/ _____

Elaine B. Goldsmith,
Clerk